No. 87-998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF APPELLANT CITY OF RICHMOND

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QUESTION PRESENTED

Whether a city, in order to remedy the virtual absence of minority participation in its city construction contracts caused by racial discrimination in its construction industry, may enact an ordinance that requires prime construction contractors to subcontract a portion of their city contracts to minority businesses.

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BRIEF OF APPELLANT CITY OF RICHMOND

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which this appeal is taken is reported at 822 F.2d 1355 (4th Cir. 1987). It is reproduced at page 1a in the appendices attached to the Jurisdictional Statement ("J.S. App. 1a"). The order of the court of appeals denying the Petition for Rehearing with Suggestion for Rehearing En Banc is unreported and is reproduced at page 27a of the appendices attached to the Jurisdictional Statement. An earlier opinion of the court of appeals, which was vacated by this Court, is reported at 779 F.2d 181 (4th Cir. 1985) and is reproduced at page one of the supplemental appendices to the Jurisdictional Statement ("J.S. Supp. App. 1"). The decision of this Court granting certiorari, vacating the earlier judg-

ment of the court of appeals and remanding to the court of appeals is reported at 106 S. Ct. 3327 (1986) and is reproduced at page 31a in the appendices attached to the Jurisdictional Statement. The opinion of the district court is unreported and is reproduced at page 112 of the supplemental appendices to the Jurisdictional Statement.

JURISDICTION

The decision of the court of appeals declaring the Richmond ordinance unconstitutional and remanding to the district court for determination of appropriate relief was issued on July 9, 1987. J.S. App. 1a. A petition for rehearing with suggestion for rehearing en banc, filed on July 23, was denied on September 18, 1987, by a vote of 6-5. *Id.* at 27a. A notice of appeal to this Court was filed with the court of appeals on November 18, 1987. *Id.* at 29a. This Court entered an order noting probable jurisdiction in this case on February 22, 1988.

On March 7, 1988, the Clerk of this Court granted appellant City of Richmond an extension of time for filing its brief until April 21, 1988, pursuant to Rule 29.4 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(2) (1982).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

This appeal involves (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the Equal Protection of the laws," and (2) Richmond's Minority Business Utilization Plan, codified at Richmond, Va., Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20, art. VIII-A (1983). This plan is reproduced at page 233 of the supplemental appendices to the Jurisdictional Statement.

STATEMENT OF THE CASE

This case will decide the constitutionality of an ordinance enacted by appellant City of Richmond to remedy the effects on its public works program of racial discrimination in its local construction industry. Before the enactment of the ordinance, the Minority Business Utilization Plan, minority-owned businesses had been receiving virtually none of Richmond's public construction contracts even though the population of Richmond was half minority. The ordinance requires recipients of city construction contracts to subcontract at least thirty percent of the dollar amount of their contracts to qualified minority-owned businesses.

Appellee J.A. Croson Co. ("Croson") is a non-minority contractor that was denied a city construction contract because it refused to comply with the ordinance's subcontracting requirement. The district court upheld the ordinance but the court of appeals reversed, finding the ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment.

A. Enactment Of The Minority Business Utilization Ordinance

The Minority Business Utilization Plan was conceived and enacted as a remedy for racial discrimination in Richmond's construction industry that had all but excluded minority businesses from the City's public works program. Expressly designated "remedial," it promotes wider participation by minority businesses in the City's construction projects. J.S. Supp. App. 248.

Prior to the ordinance, Richmond had been awarding more than 99 percent of its construction business to white-owned firms. Data compiled by the City's Department of General Services in early 1983 indicated that in the five previous years, two-thirds of one percent—essentially none—of the City's $124 million in construction contracts had been awarded to minority-owned busi-

nesses.[1] At that time, Richmond's population was approximately half minority, primarily black.[2]

The City's elected leadership concluded that this deplorable situation was a direct result of racial discrimination in Richmond's construction industry. On April 11, 1983, the Richmond City Council held a public hearing and the merits of the proposed ordinance were vigorously debated.[3] In addition to information about the negligible minority participation in the City's public construction contracts, the City Council heard evidence that the major construction trade associations in the Richmond area contained virtually no black members. The Associated General Contractors of Virginia had 600 members, including more than 130 in Richmond, but no black members;[4] the American Subcontractors Association had 80 members in the Richmond area but no black members;[5] the Richmond chapter of the Professional Contractors Estimators Association had 60 members but only one black member;[6] the Central Virginia Electrical Contractors Association had 45 members but only one black member;[7] and the Virginia Chapter of the National Electrical Contractors

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[1] Joint Appendix ("J.A.") 41. The data indicated that 0.67 percent of the value of the City's construction contracts went to minority-owned firms. *See also* J.S. Supp. App. 115.

[2] J.A. 12, 29. The district court took judicial notice of the fact that most minorities in Richmond were black. J.S. Supp. App. 207.

[3] In its opinion below, the court of appeals stated that the debate occurred "at the very end of a five-hour council meeting." J.S. App. 6a. In fact, as appellee J.A. Croson Company stated in its brief to the court of appeals, the debate lasted approximately one hour and forty-five minutes. Brief of Appellant/Cross-Appellee at 23, *J.A. Croson Co. v. City of Richmond*, No. 85-1002 (L) No. 85-1041 (4th Cir. Mar. 18, 1985).

[4] J.A. 27-28.

[5] *Id.* at 36.

[6] *Id.* at 39.

[7] *Id.* at 40.

Association had 81 members but only two black members.[8]

Representatives of each of these trade organizations appeared at the public hearing and spoke against the proposed ordinance. They claimed, among other things, that there was an insufficient number of minority contractors in the Richmond area to make the law work, and that those available would be more expensive and less reliable.[9] Supporters of the ordinance replied that similar arguments had long been used to limit minority participation in other endeavors, and often had proven unjustified.[10] In Richmond's own recent experience such arguments had been made when the City began to administer federal Community Development Block Grants, which required minority participation in federally funded construction and other projects. Those arguments were proven unfounded.[11] One of the ordinance's sponsors also pointed out that the very purpose of the ordinance was to provide opportunities for minority businesses to gain experience and prove their capabilities.[12]

The existence of discrimination in Richmond's construction industry—the core of the problem being addressed—was discussed at the public hearing and not disputed. One council member, a former Richmond mayor, drew on his own long experience with the Richmond construction industry. He stated "without equivocation"

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[8] *Id.* at 34.

[9] *Id.* at 31-32 (statement of Mr. Beck); *id.* at 33-34 (statement of Mr. Singer); *id.* at 35-37 (statement of Mr. Murphy); *id.* at 38-39 (statement of Mr. Shuman).

[10] *Id.* at 37 (statement of Mr. Kenney); *id.* at 43-44, 48 (statement of Mr. Richardson).

[11] *Id.* at 41 (statement of Mr. Marsh). Mr. Marsh explained that the percentage of minority participation in Community Development Block Grants "exceeded the numbers specified and the problems anticipated had not been realized."

[12] *Id.* at 43-44 (statement of Mr. Richardson).

that the industry is one in which "race discrimination and exclusion on the basis of race is widespread." [13] Richmond's City Manager, who has oversight responsibility for city procurement matters, concurred in these remarks.[14] No one denied that discrimination in the industry was widespread,[15] although some of the trade association representatives denied that their particular organizations engaged in discrimination.[16]

The City Council also was aware that there has been pervasive racial discrimination in the nation's construction industry. In 1977, the United States Congress had enacted a federal set-aside plan for minority contractors based on findings that the nation's construction industry is "a business system which has traditionally excluded measurable minority participation," [17] and that industry discrimination had severely limited minority participation in public contracting at the federal, state and local level.[18] In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld the constitutionality of the federal set-aside plan, finding that Congress had "abundant evi-

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[13] *Id.* at 41 (statement of Mr. Marsh). Aside from his time in public office in Richmond, Councilman Marsh has been practicing law in Richmond since 1961.

[14] *Id.* at 42 (statement of Mr. Deese).

[15] J.S. Supp. App. 164-65.

[16] J.A. 20 (statement of Mr. Watts); *id.* at 39 (statement of Mr. Shuman).

[17] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove v. Klutznick*, 448 U.S. 448, 466 n.48 (1980) (plurality opinion); *id.* at 505 (Powell, J., concurring).

[18] Years earlier, the President of the United States had issued an executive order authorizing affirmative action policies in federal contract procurement as a means to remedy the effects of discrimination. Exec. Order No. 11,114, 3 C.F.R. 774 (1959-63). This program was continued with Exec. Order No. 11,246. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65) as amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979).

dence" of racial discrimination in the construction industry to support its remedial action. *Id.* at 477-78 (plurality opinion). The Richmond ordinance was drafted with the *Fullilove* decision, and the findings of discrimination discussed therein, in mind. J.A. 14-15, 24-25.

At the end of the public hearing, the City Council voted six to two, with one abstention, to enact into law the Minority Business Utilization Plan.[19]

B. The Ordinance's Provisions

The Minority Business Utilization Plan requires contractors to whom the City awards prime contracts to subcontract at least thirty percent of the dollar amount of the contracts to minority business enterprises (MBEs), unless the prime contractor is itself an MBE or the City waives the requirement. The ordinance is designed to expire on June 30, 1988.[20]

Because the ordinance does not set aside prime contracts for minority businesses, the competitiveness of the bidding process is preserved. Since a prime contractor normally must make subcontracting arrangements before it can calculate its bid, the ordinance contemplates that minority subcontractors will be participants in the competitive bidding process. Once the bids are opened, the apparent low bidder is given ten days to submit a satisfactory Minority Business Utilization Commitment Form, containing information about the MBE subcontractor or

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[19] Richmond, Va. Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20 (1983). The plan actually was enacted pursuant to two ordinances. *See* J.S. Supp. App. 233, 249.

[20] Of course, the expiration of the Minority Business Utilization Plan does not moot this case. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract was unlawful and entitles Croson to damages. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978).

subcontractors, or to seek a waiver of the minority subcontracting requirement. J.S. Supp. App. 60-61, 69.[21]

The ordinance authorizes the Director of the Department of General Services to promulgate regulations "which . . . shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." [22] According to these regulations, the thirty percent requirement will be waived or lowered in the following circumstance:

> To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE Goal.

Id. at 67-68. The denial of a waiver may be appealed under the City's normal appeals procedures for disappointed bidders. *Id.* at 192.

The ordinance defines a Minority Business Enterprise as a business at least fifty-one percent of which is owned and controlled by minority group members.[23] The ordi-

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[21] Since the time that Croson brought this lawsuit, that procedure has been changed. The new requirement is that a prime contractor must submit a Minority Business Utilization Form or a waiver request with its bid or the bid will be considered non-responsive.

[22] J.S. Supp. App. 247. The City Council contemplated that the regulations would be similar to the waiver provisions used in the City's administration of Community Development Block Grants. J.A. 12-13.

[23] J.S. Supp. App. 251. The requirement that the business be controlled as well as owned by minority group members was added by amendment to the plan in June 1983. *See id. at* 217-18. Minority group members are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 252.

nance's regulations require a city administrative officer to verify that minority businesses seeking to participate in a city construction contract are in fact owned and controlled by minorities, so that "sham" MBEs cannot take advantage of the plan. *Id.* at 62. The regulations also list the names and phone numbers of five Richmond agencies that will assist contractors in locating qualified, bona fide minority businesses to participate in a construction contract. *Id.* at 67.

C. The Ordinance Applied To Croson

On September 6, 1983, Richmond invited bids for the installation of plumbing fixtures at the city jail. The bids were due by October 12. J.S. Supp. App. 120. Croson, a non-MBE mechanical, plumbing, and heating contractor based in Richmond, decided to bid on the project and determined that it could meet the City's minority subcontracting requirement by purchasing certain plumbing fixtures from an MBE. *Id.* at 121.

Croson's regional manager, Eugene Bonn, had brief telephone conversations with several MBE suppliers on September 30.[24] On October 12, the day the bids were due, he contacted a local MBE, Continental Metal Hose ("Continental").[25] Continental's president, Melvin Brown, told Bonn that he wished to participate in the project with Croson, but he could not state a firm price on such short notice because he could not get an immediate commitment from suppliers. *Id.* at 122-23. Croson then sub-

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[24] Evidence in the record indicates that Croson's efforts to make subcontracting arrangements with an MBE were less than diligent. Telephone records submitted to the district court indicated that the five conversations lasted a total of less than ten minutes. *See id.* at 8 n.4. According to testimony before the district court, two of these MBEs expressed interest in the project and requested bid specifications from Bonn, but never received them. Officers of a third testified that they never received Bonn's call. *Id.*

[25] Bonn claims to have telephoned Continental's president on September 30, but the president denies this. *Id.* at 121-22.

mitted a bid using a quote for the plumbing fixtures received from a non-minority firm. *Id.* at 124.

As it turned out, Croson was the only bidder and was awarded the contract subject to its commitment to subcontract with an MBE. Continental's Brown attended the bid opening on October 13 and at that meeting was encouraged by Croson to continue trying to obtain a quote from suppliers. *Id.* at 123-24. Croson nevertheless requested a waiver of the MBE requirement on October 19, indicating simply that Continental was "unqualified" and that other MBEs contacted were "non-responsive" or "unable to quote." Brown learned of the waiver request on October 27, at which point he contacted a city official and represented that Continental was available to provide the fixtures specified in the contract. *Id.* at 124-25.

The City denied Croson's request for a waiver by letter dated November 2, and gave Croson ten more days to comply with the subcontracting requirement. By that time, Continental was able to quote a firm price, but it was higher than Croson had hoped. Croson again requested a waiver, or, alternatively, an increase in the contract price. The City elected instead to rebid the project and invited Croson to submit another bid. Rather than submit a new bid, Croson brought this lawsuit. *Id.* at 126-29.

D. The Proceedings Below

In its complaint, Croson claimed that the Minority Business Utilization Plan violated the Equal Protection Clause of the Fourteenth Amendment and Virginia state law, and it sought an injunction, declaratory relief, and damages. After a bench trial, the district court held for Richmond on all counts.[26]

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[26] *Id.* at 112. Croson also raised federal statutory claims based on 42 U.S.C. §§ 1981 and 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. However, Croson agreed these claims had no basis in the absence of a valid equal protection claim, J.S. Supp. App. 222-23, and did not raise them on appeal.

After finding the Richmond ordinance permissible under Virginia law, the district court considered Croson's equal protection claim. J.S. Supp. App. 155. Since the appropriate constitutional standard for review of race-based remedial programs had been left unresolved by this Court in *Fullilove* and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the district court relied on a three-part test synthesized from those cases by the Eleventh Circuit:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.[27]

The district court determined that the Richmond ordinance met all the requirements of this test, and thus comported with the decisions of this Court in *Fullilove* and *Bakke*.

The first element of the test was satisfied because Virginia law granted municipalities the authority to adopt such legislation. J.S. Supp. App. 162-63. The district court found the second element satisfied because the City Council had before it sufficient evidence to conclude that racial discrimination in the local construction industry had severely impaired minority participation in the industry and that minority participation in the City's own public works program was negligible as a result. It cited the "enormous disparities" between the percentage of city construction contracts awarded to minorities and the

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[27] J.S. Supp. App. 161-62 (quoting *South Florida Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (emphasis omitted)).

percentage of minorities in Richmond, the hearing testimony of trade association representatives indicating that there were few minority businesses in the local construction industry, and the unrefuted hearing testimony about discrimination in that industry. *Id.* at 164-65. It also stated that Congress had "already extensively documented the fact that low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects of past discrimination." *Id.* at 165.

In considering the third element of the test, concerning the means employed in the remedial ordinance, the district court relied on a five-factor inquiry derived from Justice Powell's *Fullilove* opinion: (1) the reasonableness of the percentage chosen; (2) the adequacy of the waiver provision; (3) the consideration of alternative remedies; (4) the duration of the remedy; and (5) the ordinance's effects on innocent third parties. The court did a careful analysis of each of these factors and concluded that the test was satisfied. *Id.* at 172-98. It also rejected the argument that the Richmond ordinance was "overinclusive." *Id.* at 198-209.

On appeal, the court of appeals affirmed the district court in all respects, with Judge Wilkinson dissenting. *Id.* at 1. It found that the district court was correct to review the Richmond ordinance under the equal protection standards established in *Fullilove*, and that the district court had appropriately applied those standards. *Id.* at 24-55.

Croson sought certiorari from this Court, which granted the writ, summarily vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, and without briefing or argument on the impact of *Wygant*, the original panel of the court of appeals reversed itself and found the Richmond ordinance unconstitutional, Judge Wilkinson writing for a divided court over a dissent from Judge Sprouse. J.S. App. 1a.

As the court of appeals' majority interpreted *Wygant*, Richmond was required to demonstrate a "compelling" interest in its ordinance, and could do that only by showing that it "had a firm basis for believing [there was] prior discrimination by the locality itself." *Id.* at 9a. The majority considered the City's statistical evidence "spurious" and the City Council hearing testimony "nearly weightless." *Id.* at 8a. It concluded that the Richmond ordinance was predicated only on "the loosest sort of inferences" of past discrimination by the City, and therefore was unconstitutional. *Id.* The majority also held, in the alternative, that the ordinance was not sufficiently "narrowly tailored" to meet its remedial goal. *Id.* at 11a.

The dissent argued that the majority "misconstrues and misapplies *Wygant*." *Id.* at 14a. It stated that *Wygant* did not require evidence of discrimination in public procurement by the City itself, but that this requirement had been satisfied in any event. *Id.* at 18a. It noted the history of pervasive racial discrimination in the nation's construction industry, *id.* at 19a, and it found that the disparity between the percentage of Richmond's construction contracts awarded to minority businesses and the percentage of minorities in Richmond was so dramatic as to "break[] the bounds of the sometimes suspect 'science' of statistics." *Id.* at 21a.

The dissent concluded that the proof of governmental discrimination required by the majority "might be fatally counterproductive to the concept of affirmative action," *id.* at 20a, and in any event is inappropriate "in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond." *Id.* n.11. It stated that the proof required by the majority "would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool." *Id.* at 20a. The dissent also found the

Richmond ordinance sufficiently narrowly tailored to pass constitutional muster.

Richmond filed a petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition by a vote of six to five. *Id.* at 27a.

SUMMARY OF ARGUMENT

The central issue in this case is whether the court of appeals erred in holding Richmond's Minority Business Utilization Plan unconstitutional on the basis of language in the plurality opinion in *Wygant v. Jackson Board of Education*, which it construed to require a governmental entity to demonstrate its own discrimination in order to justify an affirmative action plan. To reach this conclusion, the court of appeals ignored relevant precedents of this Court, particularly *Fullilove v. Klutznick*, which presented facts and legal issues very close to those presented here.

Upon analysis, it is clear that *Wygant* does not control this case and that Richmond's remedial ordinance is entirely consistent with the relevant precedents of this Court. The ordinance represents a responsible legislative effort to remedy the effects on the City's public works program of longstanding, pervasive racial discrimination in the local construction industry. Richmond's ordinance is well designed to achieve its remedial purpose and has only minimal impact on non-minorities.

In the five years prior to the enactment of the Minority Business Utilization Plan in 1983, Richmond, which has a population that is half minority, awarded more than 99 percent of its $124 million in public construction contracts to white-owned businesses. There is no serious dispute that this fact reflects a local construction industry in which minority entry and advancement have been stymied by years of racial discrimination. The effects of this discrimination also are reflected in the virtual absence of black members in Richmond's major construction

trade associations. At the public hearing on the merits of the ordinance, the City Council heard knowledgeable and unrefuted testimony about this industry discrimination. The City Council was well aware that Richmond was part of a longstanding pattern of racial discrimination throughout the nation's construction industry.

Richmond had a compelling interest in remedying the effects of this identified local industry discrimination on its own public works program, much like the interest supporting the federal program in *Fullilove*. Like Congress, the City had been awarding its taxpayers' dollars to a pool of contractors from which minorities had been substantially excluded by unlawful racial discrimination, and thus it had become a passive participant in that discrimination. Like Congress, Richmond sought to put minority-owned construction firms on a more equitable footing with respect to public contracting opportunities. As this Court found in *Fullilove*, this was an entirely appropriate use of affirmative action. Richmond needed to take race into account because race-neutral remedies would not overcome the disabling effects of past discrimination.

Richmond's interest in its ordinance was especially compelling since if Richmond had not acted, there would have been no remedy. Though part of a national pattern, the effects of local construction industry discrimination on Richmond's own public works program was Richmond's problem, peculiarly within the competence of Richmond's legislative body. It would distort principles of federalism to deny Richmond the means effectively to address this problem, while permitting the federal government to take similar remedial action under similar circumstances.

The court of appeals below nevertheless held Richmond's ordinance unconstitutional because it was not predicated on Richmond's own discrimination against

minority contractors. This requirement was based entirely on language in the plurality opinion in *Wygant*. Not only did this language not receive the support of a majority of this Court, but even the plurality did not decide that a government always must demonstrate its own discrimination in order to enact an affirmative action plan. Governmental discrimination was not a decisive issue in *Wygant*, both because the evidence in the record was not probative of any sort of discrimination, and because layoffs were determined to be an inappropriate means to achieve even a compelling purpose. *Wygant* does not control the result here.

The court of appeals' "governmental discrimination" requirement is wholly inappropriate because pervasive, unlawful industry discrimination, and its profound effect on Richmond's public works program, provided an adequate basis for remedial action. Requiring evidence of governmental discrimination under these circumstances is unnecessary and beside the point. Moreover, because proof of governmental discrimination is elusive where industry discrimination has largely prevented minority businesses from even competing for city construction contracts, this requirement would preclude any remedy for this most effective and pernicious discrimination.

Finally, the minority business utilization ordinance is carefully designed to meet its remedial goal with minimal impact on non-minorities. By teaming up minority subcontractors with more established, white-owned firms, the ordinance removes obstacles that have kept minority businesses out of public contracting and provides them with valuable experience, credibility, and an opportunity to develop business relationships with more established firms. The ordinance's impact on non-minorities is slight since no prime contracts are set aside for minorities, the subcontracting requirement does not unsettle any vested right or expectation, and thirty percent of city construc-

tion contracts represents only a tiny fraction of all construction contracting opportunities in Richmond. In addition, the ordinance is temporary, contains a reasonable waiver provision, and is designed to root out "sham" minority businesses.

ARGUMENT

Racial inequality remains a scourge of our society. Cities, states, and the federal government each have a crucial role to play in the effort to rid our country of racial discrimination and its continuing effects.

Richmond, like other cities, has accepted that responsibility. In 1983, in response to clear evidence that racial discrimination in its local construction industry had resulted in a nearly all-white industry, and consequently a distribution of public construction contracts only to businesses owned by whites, Richmond enacted the Minority Business Utilization Plan. This ordinance requires contractors to whom the City awarded prime contracts to subcontract at least thirty percent of the dollar amount of their city contracts to minority businesses.

This case tests whether the Constitution forbids Richmond from enacting this remedial legislation. More particularly, it tests whether the court of appeals was correct in relying on language in *Wygant* to the exclusion of a line of more relevant precedents of this Court, especially *Fullilove*. When the Richmond ordinance is analyzed in light of its purpose and those precedents, it is clear that it is constitutional and that the court of appeals' reliance on *Wygant* was misplaced.

The level of constitutional scrutiny to be applied to remedial legislation like the Richmond ordinance has not been determined by this Court.[28] Appellant submits that

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[28] "[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is

an intermediate level of scrutiny, as endorsed by several members of this Court, is the appropriate standard to be applied in this case because racial classifications are not inherently suspect where they are used as part of a remedy for the effects of identified racial discrimination.[29]

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made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis." *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (plurality opinion). *See also id.* n.17; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3052-53 (1986) (plurality opinion) ("We have not agreed . . . on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures").

[29] "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . ." *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). *See also Wygant*, 476 U.S. at 296 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting); *Fullilove*, 448 U.S. at 507 (Powell, J., concurring); *id.* at 519 (Marshall, J., concurring in the judgment); *id.* at 550-554 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 305 (opinion of Powell, J.); *id.* at 359 (Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting in part).

The Equal Protection Clause of the Fourteenth Amendment does not require strict scrutiny of affirmative action measures. Its core purpose is not to prohibit the use of racial classifications *per se*, but to prohibit their use to subjugate or disadvantage on the basis of race. *See Brown v. Board of Education*, 347 U.S. 483, 493-94 (1954) (racial segregation in public schools violates the Equal Protection Clause because it "generates a feeling of inferiority" in the hearts and minds of black children). *See also* J. Ely, *Democracy and Distrust* 135-36, 152-53 (1980); L. Tribe, *American Constitutional Law* 1514-21 (2d ed. 1988). Whites as a racial group historically have not been subjugated or disadvantaged by non-whites, and affirmative action does not have such a purpose or effect. Where, as here, it appears that racial classifications are being used to remedy past discrimination against non-whites, an intermediate level of judicial scrutiny is sufficient to ensure that they are not actually serving some improper purpose and that the effect that they have on whites is not unreasonably burdensome.

Even under strict scrutiny, however, the Minority Business Utilization Plan passes constitutional muster.

Whatever the level of scrutiny, the constitutional inquiry has two prongs: 1) whether the affirmative action plan serves interests sufficiently "important" or "compelling" to justify the use of racial classifications; and 2) whether the plan is adequately tailored to serve its purpose without unnecessarily harming the interests of non-minorities.[30] Richmond's minority business utilization ordinance satisfies both of these requirements. It is legislation designed to remedy the effects of identified racial discrimination in Richmond's construction industry that substantially had foreclosed minority access to contracting opportunities with the City, and it is a temporary, flexible plan that imposes little burden on non-minorities.

I. RICHMOND HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS ON ITS PUBLIC WORKS PROGRAM OF RACIAL DISCRIMINATION IN THE LOCAL CONSTRUCTION INDUSTRY

State and local governments unquestionably have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." [31] Richmond's City Council adopted its Minority Business Utilization Plan because racial discrimination in Richmond's construction industry long had impaired minority entry and advancement in the industry, and, as a consequence, minority businesses were receiving virtually none of the City's public construction contracts. This factual predicate was found by the district court to be amply supported and has not seriously been contested.

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[30] *See Paradise*, 107 S. Ct. at 1064 & n.17 (plurality opinion); *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (plurality opinion).

[31] *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Whether this predicate of discrimination justifies Richmond's ordinance is the critical issue in this case. The court of appeals held that the only predicate that would justify the ordinance is the City's own discrimination. Richmond submits that it has a compelling interest in remedying the effects of identified construction industry discrimination on its public works program regardless of whether the City itself has discriminated. Richmond's remedial action represents a considered decision by Richmond's elected legislative body, which is fully aware of its responsibilities to all the people of Richmond, and constitutes an appropriate use of affirmative action.

A. Racial Discrimination In The Local Construction Industry Had Substantially Foreclosed Minority Access To City Contracting Opportunities

In 1983, one-half of the population of Richmond was minority, primarily black. In the five years prior to 1983, two-thirds of one percent—practically none—of the City's $124 million in construction contracts was awarded to minority-owned businesses. As both the City Council and the district court concluded, this disturbing fact was a direct consequence of pervasive racial discrimination in Richmond's local construction industry that had impaired minority entry and advancement and had substantially foreclosed minority opportunities to compete for city construction contracts.

This conclusion has abundant support in the facts of this case. The disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond—less than one percent versus fifty percent—is so enormous that by itself it creates a strong inference of discrimination. In a city that is half minority and that awards $124 million in city construction contracts over a five-year period, one would expect

minority businesses to be awarded much more than two-thirds of one percent of those contracts, absent discrimination.[32] Because the number of minority contractors in Richmond was "quite small," J.S. App. 7a, this discrimination must have been in the industry itself.

When this evidence is combined with other facts, the inference of discrimination becomes so powerful that "innocent" explanations of the meager minority participation in Richmond's city construction contracts seem farfetched at best.[33] As the City Council learned, and as the following chart demonstrates, in 1983 there were literally no black members in one of Richmond's principal construction trade associations, the Associated General Contractors, and virtually no black members in other major construction trade associations in the Richmond area:

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[32] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977) (statistics showing racial imbalance between work force and general population may reflect discrimination).

[33] The probativeness of the statistical evidence here is illustrated by comparison to the statistical evidence of discrimination in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In enacting the minority set-aside provision of the Public Works Employment Act of 1977, Congress also relied on a disparity between the percentage of federal contracts awarded to minority businesses and the percentage of minorities in the general population. *Id.* at 459 (plurality opinion). The level of minority participation in federal contracts was also less than one percent, but minorities comprised only 15-18 percent of the nation's population, compared to 50 percent in Richmond. Chief Justice Burger nevertheless cited this disparity as a key piece of evidence in upholding Congress' findings on the effects of racial discrimination in the nation's construction industry. *Id.* at 478 (plurality opinion).

BLACK MEMBERSHIP IN RICHMOND'S MAJOR CONSTRUCTION TRADE ASSOCIATIONS IN 1983 [34]

Organization	Total Membership	Black Membership
Associated General Contractors (Virginia)	600	0
Associated General Contractors (Richmond)	130	0
American Subcontractors Association (Richmond)	80	0
Professional Contractors Estimators Association (Richmond)	60	1
Central Virginia Electrical Contractors Association	45	1
National Electrical Contractors Association (Virginia)	81	2

Like the negligible minority participation in the City's construction contracts, the near absence of minority members in these trade organizations is a manifestation of pervasive racial discrimination in Richmond's local con-

[34] This chart lists those trade associations whose representatives testified at the City Council hearing on the Minority Business Utilization Plan and provided information on black membership. J.A. 27-28, 34, 36, 39-40. The Richmond Builders Exchange, the Richmond Plumbing, Heating and Cooling Contractors Association and Richmond Area Municipal Contractors Association also were represented at the hearing but provided no information on black membership.

struction industry. Moreover, because membership in these organizations represents a significant economic opportunity,[35] these figures dramatically underscore the continuing effects of that discrimination.

At the City Council hearing, there was knowledgeable testimony, including the testimony of a former Richmond mayor, that discrimination in Richmond's construction industry in fact was widespread.[36] Moreover, while the merits of the ordinance were vigorously debated, no one denied that pervasive discrimination had occurred. It simply was beyond dispute that discrimination had denied minorities significant participation in the local construction industry, and therefore in Richmond's public construction contracts as well.[37]

Richmond's experience is not unique. There is a long, well-documented history of racial discrimination throughout the nation's construction industry. Black workers for years have been excluded from the skilled construction trade unions and training programs and hired only for relatively unskilled positions.[38] Whites have dominated

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[35] For example, members of the Associated General Contractors of America ("AGC") perform almost 80 percent of all commercial construction work in this country, according to a brief filed by the AGC in the court of appeals below. *See* Motion of the Associated General Contractors of America, Inc. for Leave to File as an *Amicus Curiae* in Support of the Appellant/Cross-appellee at 3, *J.A. Croson Co. v. City of Richmond*, Nos. 85-1002, 85-1041 (4th Cir. Mar. 18, 1985). The AGC also points out that construction is one of the largest industries in the United States, representing approximately eight percent of the nation's gross national product. *Id.*

[36] *See supra* p. 5-6.

[37] The record in this case contains no finding on the precise number of contractors in Richmond who were minority in 1983, though there has been no dispute that the number is "quite small." J.S. App. 7a.

[38] As this Court noted in a similar context, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make

the skilled construction trades, and blacks have been prevented from following the traditional path from laborer to entrepreneur.[39] Consequently, most construction businesses are owned and managed by whites, as in Richmond.[40] Those few minority-owned construction businesses that have been formed have faced formidable ob-

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such exclusion a proper subject for judicial notice." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979).

This exclusion of black workers from skilled construction crafts began over a hundred years ago. At the time of the Civil War, black workers constituted the majority of the skilled workers, including construction workers, in the South. H. Hill, *Black Labor and the American Legal System: Race, Work and the Law* 9-11 (1985); S. Spero & A. Harris, *The Black Worker: The Negro and the Labor Movement* 16 (1931); G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 1079-1124 (1962); R. Weaver, *Negro Labor: A National Problem* 4-5 (1946); R. Rowan & L. Rubin, *Opening the Skilled Construction Trades to Blacks: A Study of the Washington and Indianapolis Plans for Minority Employment* 10-15 (1972). After the Civil War, and particularly after Reconstruction, black workers were systematically evicted from their craft positions in favor of white workers and barriers were erected to prevent black workers from entering those crafts in the future. Hill, *supra* at 12-34, 235-47; Myrdal, *supra* at 228-29. Construction historically is an industry from which blacks have been excluded by law and by the dominance of racially restrictive unions. M. Karson & R. Radosh, "The AFL and the Negro Worker, 1894-1949," in *The Negro and the American Labor Movement* 157-58 (J. Jacobson ed. 1968); Marshall, "The Negro in Southern Unions," in *The Negro and the American Labor Movement* 145 (J. Jacobson ed. 1968).

[39] *Fullilove*, 448 U.S. at 511-12 (Powell, J., concurring); *Rhode Island Chapter, Associated Gen. Contractors of Am. v. Kreps*, 450 F. Supp. 338, 356 (D.R.I. 1978); Days, *Fullilove*, 96 Yale L.J. 453, 477 (1987).

[40] J.S. App. 7a. According to testimony at the City Council hearing by a representative of the American Subcontractors Association, the latest Bureau of Census figures indicated that 4.7 percent of construction firms in this country are minority-owned, and 41 percent of these are concentrated in California, Illinois, New York, Florida and Hawaii. J.A. 35.

stacles, rooted in discrimination, that have impaired their ability to compete.[41] As one report of the United States House of Representatives stated, "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation."[42] This discrimination has as an inevitable corollary minimal participation by minority-owned businesses in public construction contracting opportunities.

This history of racial discrimination in the construction industry and its effects on public contracting are significant here because Richmond obviously has been part of this national pattern. The drafters of Richmond's Minority Business Utilization Plan in fact consulted this Court's decision in *Fullilove*, which discussed findings by the United States Congress that the effects of industry discrimination have not been confined to federal contracting. J.S. Supp. App. 165. The *Fullilove* plurality stated: "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well."[43] The congressional findings further support

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[41] In *Fullilove*, this Court explained some of the barriers that minority businesses have faced in gaining access to government contracting opportunities at the federal, state and local levels:

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disability caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

448 U.S. at 467 (plurality opinion).

[42] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove*, 448 U.S. at 466 n.48 (plurality opinion) and at 505 (Powell, J., concurring)).

[43] 448 U.S. at 478 (plurality opinion). This Court has held that a city's "substantial governmental interest" in regulating the time,

the conclusion that the enormous racial disparity in the awarding of city construction contracts was a consequence of racial discrimination in Richmond's local construction industry.[44]

The Richmond City Council, based upon the evidence of discrimination outlined above and also upon its own familiarity with the economic and social history of Richmond in general and the local construction industry in particular,[45] had abundant reason to conclude that racial discrimination was responsible for the problem that it faced. Its conclusion that discrimination had occurred is unassailable. Richmond's local construction industry

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place, or manner of protected speech may be established by findings and studies generated by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). It follows that Richmond should be able to rely on findings relevant to its problem made by the United States Congress and found by this Court to be supported by direct evidence.

[44] The facts supporting the Richmond ordinance are thus fundamentally different from the statistical evidence found insufficient to support the remedial plan in *Wygant*. In *Wygant*, the statistical evidence was not probative of discrimination. *See infra* p. 39. Here the extraordinary size of the disparity combines with other facts to compel the conclusion that discrimination had occurred.

[45] "No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum." *Wygant*, 476 U.S. at 296 (Marshall, J., dissenting). As this Court well knows, Richmond had confronted in its recent past the need to break down racial barriers in various other segments of its society and in the city government itself. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (concerning the City's annexation plan and its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (school desegregation case, finding that "within the City of Richmond there has been state . . . . action tending to perpetuate apartheid of the races . . ."), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam).

clearly has been "a business system which has traditionally excluded measurable minority participation." [46]

Once Richmond established a basis for its remedial action, the ultimate burden of proving the plan invalid was on Croson. *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987); *Wygant*, 476 U.S. at 277-78 (plurality opinion). Croson did not meet this burden. It could do nothing to rebut the compelling inference that racial discrimination was responsible for the "glaring absence" of construction contracts awarded to minority contractors. *International Brotherhood of Teamsters*, 431 U.S. at 342, n.23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers . . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' ") (*quoted in Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment)). No other explanation even would have been plausible.

The district court heard all the facts and agreed that they supported an inference of discrimination. In a thorough opinion, it explicitly found "ample evidence" to conclude that the minimal minority participation in Richmond construction contracting reflected pervasive racial discrimination in the local construction industry.[47] The

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[46] *Fullilove*, 448 U.S. at 466 n.48 (quoting H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977)).

[47] J.S. Supp. App. 165-66, 172. A factual predicate for an affirmative action plan properly is established when, after the plan is challenged in court, the trial court finds "a strong basis in evidence" for the remedial action. *Wygant*, 476 U.S. at 277 (plurality opinion); *see also id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (contemporaneous finding not required as long as there is "firm basis for believing that remedial action is required"). Because the district court below properly applied the "strong basis in evidence" test, its finding is entitled to deference. *Cf. American Textile Mfr's Inst. v. Donovan*, 452 U.S. 490, 529-30 (1981) ("Whether or not in the first instance we would find the Secretary's conclusions supported by substantial

court of appeals did not question the conclusion that discrimination had occurred, holding instead that the Richmond plan was unconstitutional because there was no finding of discrimination by Richmond itself. J.S. App. at 9a. Because the factual predicate for the Richmond ordinance has more than adequate support in the record of this case, the district court's findings should not be disturbed on this appeal.

B. Like Congress, Richmond Had A Compelling Interest In Remedying The Effects Of Identified Discrimination On Its Own Public Works Program

The Minority Business Utilization Plan was enacted after the City found itself doing business only with construction firms owned by whites, as a consequence of pervasive racial discrimination in Richmond's local construction industry. The City had a compelling interest in ending this appalling state of affairs and creating opportunities in its own public works program that had been unavailable to minorities due to that racial discrimination.

State and local governments[48] unquestionably have a compelling interest in remedying the effects of discrimination and providing equal protection of the laws in their

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evidence, we cannot say that the court of appeals in this case 'misapprehended or grossly misapplied' the substantial evidence test").

[48] A local government derives its powers from the state. The manner in which a state chooses to delegate its powers to its political subdivisions is a question of state law. *Bakke*, 438 U.S. at 366 n.42 (opinion of Brennan, J., White, J., Marshall, J. and Blackmun, J., concurring in the judgment in part and dissenting in part); *South Florida Chapter of the Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d at 852; *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 558 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982). The district court found that the City Council had the authority under state law to enact the Minority Business Utilization Plan. J.S. Supp. App. 141-154. The court of appeals did not disturb this finding.

jurisdictions.[49] This Court has held that this compelling governmental interest extends to ensuring that publicly available commercial opportunities are not denied to segments of the population on the basis of race, gender, or ethnic origin. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).[50] In so holding, the Court stressed "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups . . . ." *Id.* at 626.

This case does not test the boundaries of this governmental interest, for at the very least a municipal government has a compelling interest in eradicating the effects of discrimination and ensuring equal opportunity in its own public works program. This interest is equivalent to

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[49] For example, in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), this Court held that the states constitutionally could enact legislation prohibiting discrimination by labor organizations.

[50] In *Roberts*, this Court unanimously held that the Minnesota Human Rights Act, which prohibits discrimination in places of public accommodation, constitutionally could be applied to forbid the Jaycees from excluding women from full membership. The Court stressed that the exclusion of women from the Jaycees deprived them of business contacts, employment promotions and other commercial advantages that were publicly available to men. 468 U.S. at 626. The Court concluded that the state's interest in breaking down traditional barriers to opportunity was so compelling that it justified some infringement on the Jaycee male members' first amendment rights of free association. *Id.* at 623-626. Justice O'Connor, concurring, did not find an infringement of any rights of association, but agreed with the Court that a compelling governmental interest was involved. She stressed the importance of "the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987).

that which survived "a most searching examination" by this Court in *Fullilove*.[51] Like Congress, Richmond determined that minority businesses were receiving practically none of its public construction contracting funds as a result of racial discrimination in the construction industry. Like Congress, Richmond "has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities." 448 U.S. at 485-86 (plurality opinion). Ensuring nondiscriminatory access to government contracting opportunities is, this Court has stated, "one aspect of the equal protection of the laws." *Id.* at 478 (plurality opinion).

Like Congress, the City needed to take race into account in fashioning its remedy.[52] Simply prohibiting discrimination by its public contractors would have served little purpose, since the discrimination was already unlawful.[53]

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[51] 448 U.S. at 491 (plurality opinion). *See also id.* at 496 (Powell, J., concurring) (upholding the federal program "under the most stringent level of review").

[52] A local government's action is not unconstitutional merely because it has some negative impact on individuals' constitutional rights. *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (a city's interest in advancing esthetic values is sufficiently compelling to justify some curtailment of speech protected by the first amendment).

[53] Exclusion from a construction trade union on racial grounds constitutes a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). *See United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (judicial findings under Title VII of "exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Other forms of employment discrimination in the construction industry also violate Title VII, and employment discrimination by a recipient

Moreover, prohibiting future discrimination does nothing to remedy the disabling effects of past discrimination. In Richmond, years of purposeful racial discrimination in the local construction industry had left white contractors with overwhelming advantages in the competition for public construction contracts and the industry generally. The negligible participation of minorities in the City's construction contracts certainly gave no indication that this state of affairs was going to change by itself any time soon. Like Congress, the City determined that affirmative action was necessary to create opportunities for minority businesses in public contracting and help them become more competitive. Otherwise, the City faced the likely prospect of continuing indefinitely to distribute its taxpayers' dollars to a pool of construction contractors from which minorities had been effectively excluded.

The importance to Richmond of ensuring that government contracts are awarded without the taint of racial discrimination cannot be overstated. Like discrimination by the government itself, discrimination that forecloses access to government benefits "creates mistrust, alienation, and all too often hostility toward the entire process of government." [54] The City, by continuing to award construction contracts to a pool of contractors from which minorities had been practically excluded, in effect had become a passive participant in a system based on discrimination, and was helping to perpetuate that system. There was great potential for mistrust of and hostility toward the city government under these circumstances,

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of a Virginia public contract violates Virginia law as well. Va. Code Ann. § 11-44 (Repl. 1985). In addition, a white-owned construction firm's refusal on racial grounds to do business with a minority-owned firm violates 42 U.S.C. § 1981 (1982), which prohibits discrimination in contracting. *See Runyon v. McCrary*, 427 U.S. 160 (1976).

[54] *Wygant*, 476 at 290 (O'Connor, J., concurring) (quoting from S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971)).

and Richmond's interest in taking remedial action was substantial.

Furthermore, had Richmond not acted to remedy the problem, there would have been no remedy. Though part of a national pattern, the negligible minority participation in Richmond's public works program was Richmond's problem, to be addressed by Richmond. No other governmental entity has the same interest in this problem, and certainly no other governmental entity has the same competence to recognize the problem and fashion an appropriate remedy. No other governmental program in fact addresses the problem. It would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination on its own public works program, but a city government does not.[55]

Finally, there should be no question that the Richmond City Council was an appropriate governmental unit to take action in furtherance of the City's remedial interest. As the City's legislative body accountable to the Richmond public, the City Council was competent to identify the existence of discrimination in Richmond's construction industry and its effects on the City's own public works

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[55] The United States Commission on Civil Rights has urged that "States *and their subdivisions* must, at a minimum, enact laws which provide for their citizens the same level of protection offered by Federal statutes, executive orders, court decisions, and executive policy pronouncements." IV United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, at 129 n.32 (1975) (emphasis added) (quoting United States Commission on Civil Rights, "Revenue Sharing Program—Minimum Civil Rights Requirements" (1971)). And the Report of the National Advisory Commission on Civil Disorders (1968) (the "Kerner Commission"), established to study the causes and solutions to the urban riots of 1967, was emphatic that "[b]ecause the city is the focus of racial disorder, the immediate responsibility rests on community leaders and local institutions." Report of the Kerner Commission at 229.

program, and to determine that the City should enact appropriate remedial legislation.

C. Richmond's Remedial Action Is Justified Without Evidence Of Its Own Discrimination

The court of appeals below held Richmond's Minority Business Utilization Plan unconstitutional because it was not predicated on "prior discrimination by the locality itself." J.S. App. 9a. This requirement was unwarranted because pervasive local industry discrimination had prevented minority businesses even from competing for city contracts, and thus provided an adequate predicate for the remedial ordinance. Requiring evidence of the City's own discrimination in these circumstances would only permit this pernicious industry discrimination, and its effects on public contracting, to go unremedied. The court of appeals' requirement is incompatible with the precedents of this Court.[56]

The decision below rested on the premise that remedying a government's own discrimination is the only governmental interest that will support affirmative action policies. This case shows that this premise is untenable. As explained above, Richmond has a compelling interest in its remedial plan because of the profound effects of identified, pervasive, unlawful discrimination on its public works program. This interest is compelling regardless of whether the City itself discriminated against minorities in construction procurement.

Focusing on whether the City itself discriminated misses the point. Because racial discrimination in the local construction industry had substantially foreclosed minority access to city contracting opportunities, it had the same effect as discrimination by Richmond itself. In either case, the end result is the same—negligible minor-

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[56] The court of appeals derived the requirement from language in the plurality opinion in *Wygant*. As explained in part D below, *Wygant* does not control this case. *See infra* p. 38-41.

ity participation in the City's public construction contracts.[57]

The court of appeals' approach is unsound and leads to an anomalous result. It held that the City should have compared "the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties." J.S. App. 7a (emphasis in original). This comparison never will be probative of governmental discrimination where, as here, industry discrimination has prevented minority contractors from even competing for city contracts.[58] The court of appeals' approach would permit

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[57] *See*, Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (arguing that affirmative action plans may serve a variety of important goals other than remedying the past discrimination of the entity adopting the plan).

[58] As the district court found, the low number of minority contractors indicates "that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government contracting in particular." J.S. Supp. App. 167.

In this sense, this case is like *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). In *Weber*, this Court held that a private employer's affirmative plan was justified by a showing of a "conspicuous . . . imbalance in traditionally segregated job categories," 443 U.S. at 209, rather than a disparity between the percentage of black skilled craft workers hired and the percentage in the area labor market. In discussing this aspect of *Weber*, the Court in *Johnson* stated:

> Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.

107 S. Ct. at 1453 n.10. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (in establishing a prima facie case of employment dis-

this pervasive, unlawful industry discrimination to go unremedied. It would virtually guarantee the perpetuation of the status quo.[59]

Nothing in this Court's decisions requires evidence of Richmond's own discrimination. In *Fullilove*, there was no evidence that the federal government itself had engaged in racial discrimination in its disbursement of federal contracting funds. 448 U.S. at 527 (Stewart, J., dissenting). This Court's judgment did not depend on evidence of governmental discrimination of any type. The Court upheld the federal plan as a remedy for the effects of discrimination in limiting public contracting opportunities for minorities; though some of that discrimination was committed by state actors, nothing in either plurality opinion suggests that this was essential to the result.[60]

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crimination, plaintiff could rely on statistics concerning general population rather than applicant pool, where discriminatory practices may have discouraged persons from even entering applicant pool).

[59] In its affirmative action program for construction contractors, the federal government relies on general population statistics for precisely this reason. The Department of Labor concluded that it would not consider particular trades or crafts as the relevant labor pool, since minorities had been excluded from those trades and crafts by discrimination. *See* 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65983 (1980).

[60] For Justice Powell, the result in *Fullilove* clearly turned on the existence of identified, illegal discrimination, whether committed by private or state actors. He stated in his concurring opinion: "[T]he distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation. . . ." 448 U.S. at 498. Congress' action was permissible in his view because refusals to subcontract to minority contractors could violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment, depending on the identity of the discriminating party. *Id.* at 506. It was also signifi-

In *Johnson*, this Court held that Title VII of the Civil Rights Act of 1964 does not require a public employer's voluntary affirmative action plan to be predicated on its own discrimination. 107 S. Ct. at 1451. To justify its affirmative action plan, an employer need not show that it has committed even an "arguable violation" of Title VII; all that is required is a showing of a manifest imbalance in a traditionally segregated job category. *Id.* at 1451-52. This is the requirement under Title VII even where, as in *Johnson*, the court affirmatively finds that the employer has not engaged in discrimination. *Id.* at 1466 (Scalia, J., dissenting).

A significantly different requirement should not be imposed under the Equal Protection Clause. Even if the prohibitions of Title VII and the Equal Protection Clause are not identical, a point about which there has been some dispute, they serve similar purposes.[61] In *Johnson*, this

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cant that Congress was a competent body to remedy the effects of this discrimination. *Id.* at 498 (Powell, J., concurring).

Justice Powell had applied the same rationale in *Bakke*, concluding that the state medical school's use of race-conscious measures was unconstitutional because it was not predicated on findings of identified discrimination made by a governmental body competent to make such findings. *Bakke*, 438 U.S. at 307-09. *See also Fullilove*, 448 U.S. at 498.

[61] Moreover, Title VII contains a prohibition on racial discrimination that is far more specific than the language in the Equal Protection Clause. Therefore, as Justice Scalia stated in *Johnson*, joined by Chief Justice Rehnquist and Justice White, "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." 107 S. Ct. at 1469 (Scalia, J., dissenting) (emphasis in original). Justice O'Connor in *Johnson* also stated her view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 1461 (O'Connor, J., concurring). In *Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring), Justice Powell indicated his belief that the standards of analysis in Title VII and Equal Protection cases are similar, though not identical.

Court reasoned that requiring employers to present evidence of even an "arguable violation" of law could thwart voluntary affirmative action efforts, which can play a critical role in furthering Title VII's objective of " 'break[ing] down old patterns of racial segregation and hierarchy.' " *Id.* at 1450-51 (quoting *Weber*, 443 U.S. at 208).[62] The Equal Protection Clause of the Fourteenth Amendment, ratified into law as centuries of slavery were coming to an end, had an objective similar to and no less compelling than that of Title VII.[63] Requiring a municipality to present evidence of its own discrimination would undermine the goals of the Equal Protection Clause, just as it undermines the goals of Title VII.[64] Such a require-

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[62] The Richmond City Council in fact was very concerned that its enactment of a remedial plan not be construed as an admission of liability for past discrimination. When one Council member expressed concern that characterizing the plan as "remedial" might give rise to liability, the City's attorney responded:

> In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is that there are statistics about the number of minorities which were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case.

J.A. 15.

[63] *See Bakke*, 438 U.S. at 291 (Powell, J.) (the Fourteenth Amendment's " 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from oppressions of those who had formerly exercised unlimited dominion over him' ") (quoting from *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71 (1872)). It would be ironic to use the amendment to prevent the states from achieving that original purpose. "Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about." *Bakke*, 438 U.S. at 405 (opinion of Blackmun, J.).

[64] Not only would such a requirement generate concerns about legal liability, but the process of requiring public officials to reopen the past could be painful and divisive to the community as a whole. A municipality that wishes to achieve racial equality should not have to take such risks in order to do so.

ment would be a dramatic departure from this Court's reasoning in *Johnson*.[65]

D. *Wygant v. Jackson Board of Education* Does Not Control This Case

The sole support cited by the court of appeals for its "governmental discrimination" requirement is language in the plurality opinion in *Wygant*. The portion of the opinion on which it relied is as follows:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

476 U.S. at 274 (plurality opinion). *See* J.S. App. 5a. The court of appeals incorrectly concluded that this language dictates the result in this case.

The language quoted above did not receive the support of a majority of this Court in *Wygant*, and in any event had little to do with even the holding of the plurality.

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[65] In *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986), this Court reaffirmed the proposition that there is a compelling governmental interest in remedying the effects of identified racial discrimination even where the government itself has not discriminated. The Court held that a district court was not statutorily or constitutionally prohibited from ordering a union and its apprenticeship committee to implement affirmative action policies to improve minority membership. The union and apprenticeship committee had been found guilty of egregious violations of Title VII by discriminating against racial minorities in recruitment, selection, training and admission to the union. Because of this discrimination, which was wholly private, the court's order survived even Justice Powell's strict scrutiny under the Equal Protection Clause. He stated that the finding of egregious Title VII violations "establishes, without a doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy." 106 S. Ct. at 3055 (Powell, J., concurring).

In contrast to *Fullilove*, *Wygant* involved issues very different from those presented here. Not only did it concern a layoff scheme in a school employment context, but the governmental interest supporting the layoffs was nothing like that supporting the Richmond plan. The court of appeals below simply misapplied *Wygant* to the facts of this case.

The court of appeals in *Wygant* had upheld a race-conscious layoff provision on the theory that a school board had an interest in providing minority role models for its minority students in order to alleviate the effects of societal discrimination. A plurality of the Court rejected the court of appeals' approach, reasoning that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." 476 U.S. at 276. Moreover, the key evidence in the record in *Wygant* simply was not probative of any sort of discrimination. As Justice Powell explained, "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups." *Id.*

There thus was an absence of identified discrimination in *Wygant*; the Court never considered whether a local governmental body always must demonstrate its own discrimination in order to establish an "important" or "compelling" interest in its remedial plan.[66] It certainly never considered "governmental interest" issues in the public contracting context. The critical issues in the present case were neither addressed nor resolved in *Wygant*.

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[66] The Court did not consider the school board's claims that it in fact had engaged in past discrimination because a plurality of the Court found the school board's layoff provision an unconstitutional means to implement affirmative action policies in any event. *See Wygant*, 476 U.S. at 277 (plurality opinion).

At most, the plurality in *Wygant* held that societal discrimination alone, as exemplified by the lower court's role model theory, is insufficient to justify a racial classification.[67] The entire Court also reaffirmed the proposition that "remedying past or present racial discrimination by a state actor *is* a sufficiently weighty state interest" to justify a racial classification. *Id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). However, *Wygant* decided little or nothing about governmental interests that lie between these two extremes.[68]

Fullilove clearly is the precedent most relevant to this case. The governmental interest here is practically the same as that at issue in *Fullilove*, and is fundamentally different from that at issue in *Wygant*. Richmond's ordinance was not a remedy for "societal discrimination." It was predicated on identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts. The City was a passive participant in that discrimination almost every time it awarded

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[67] *Id.* at 274-76 (plurality opinion). As the term had been used in *Bakke*, "societal discrimination" simply meant unidentified discrimination by society at large. *See, e.g.*, 438 U.S. at 307 (Powell, J.). Prior to *Wygant*, the term had not been used to refer to all discrimination not committed by a state actor. In fact, this Court in *Fullilove* held that the interest in remedying private identified discrimination may support a government's use of racial classifications. *See supra* p. 35 & note 60.

[68] As Justice O'Connor pointed out in her separate opinion:

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.

Id. at 286 (O'Connor, concurring in part and concurring in the judgment).

a construction contract. Under these circumstances, Richmond had a substantial interest in opening for minority businesses the public contracting opportunities that long had been closed to them.

II. THE RICHMOND ORDINANCE IS SUFFICIENTLY NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE

A state or local government must choose appropriate means to implement the ends of its affirmative action plan. This Court has identified a number of factors to be considered in determining whether a race-conscious plan employs constitutionally acceptable means to achieve its purpose. These include:

> the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 107 S. Ct. at 1067 (plurality opinion).[69] When considered in light of these factors, the Richmond ordinance is sufficiently narrowly tailored to pass constitutional muster. It is a temporary, flexible plan that is designed to fit its remedial purpose and have minimal impact on the interests of non-minorities.[70]

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[69] These factors are almost identical to those set forth by Justice Powell in his concurring opinion in *Fullilove*, *see* 448 U.S. at 510-11, and considered by the district court below. *See supra* p. 12.

[70] The plan also was reasonably applied to appellee Croson. The district court so found after conducting an evidentiary hearing on the circumstances surrounding the refusal to award Croson a contract. J.S. Supp. App. 209-214 & n.20. The court of appeals did not disturb this factual finding.

A. The Richmond Ordinance Is Necessary To Remedy the Effects Of Racial Discrimination On City Construction Contracting And Has Minimal Adverse Impact On Non-Minorities

Once Richmond identified the problem that it faced, it enacted an ordinance that was well designed to correct that problem. The ordinance has minimal impact on non-minorities, and it preserves the competitiveness of the bidding process for city construction contracts.

As Congress found and this Court acknowledged in *Fullilove*, minority opportunities in public construction contracting have been limited by business practices that effectively perpetuate the effects of longstanding racial discrimination.[71] This clearly is the case in Richmond. Like Congress, the Richmond City Council had good reason to believe that there could be no change in the status quo without race-conscious affirmative action to break down barriers to minority opportunity in its public works program.

Richmond's ordinance was well designed to remedy the problems faced by minority-owned construction firms. These firms needed an opportunity to develop so that they could better compete in the marketplace, including the market for the City's construction contracts. Accordingly, none of the City's prime construction contracts have been set aside for minority businesses. Rather, the City more realistically chose to ensure opportunities for minorities at the subcontracting level. By teaming up minority businesses with more established, white-owned firms, the ordinance removes some obstacles that had kept existing minority firms out of public contract-

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[71] *See Fullilove*, 448 U.S. at 478 (plurality opinion) ("a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises . . . result[s] . . . from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . .").

ing, such as lack of a track record, access to financing to meet bonding requirements, and purposeful racial discrimination within the industry. *See supra* note 41. It also aids these firms by providing a source of revenue, giving them greater experience and credibility, and creating an opportunity to develop relationships with the more established contractors.

In addition, the ordinance encourages the formation of contracting firms by minorities that previously had seen little opportunity in construction contracting in Richmond. As this Court has stated: "Affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.'" *Sheet Metal Workers*, 106 S. Ct. at 3037 (plurality opinion) (quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)). In short, racial discrimination had created a "business system" [72] that had largely excluded minorities and had enabled white-owned firms to dominate the competition for city construction contracts; the Minority Business Utilization Plan was well designed to remedy the effects of this discrimination by bringing minority contractors into the business system and thus into a position to compete for city contracts.

The ordinance also has only a minor impact on non-minority contractors. Unlike white teachers who are laid off because of preferences given to minorities, *see Wygant*, 476 U.S. at 272 (plurality opinion), no contractor has a vested right to a public construction contract, or a portion thereof. Nor does the Richmond ordinance unsettle any contractor's "legitimate firmly rooted expectation." *Johnson*, 107 S. Ct. at 1455. As this Court recognized in *Fullilove*, the actual "burden" shouldered by non-minority firms is very light when the amount spent

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[72] *See supra* note 42 and accompanying text.

by the City on construction contracting is compared with overall construction opportunities.[73] Moreover, as this Court also observed in *Fullilove*, it is not unreasonable to assume "that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." 448 U.S. at 485 (plurality opinion). In view of these considerations, any slight burden that the ordinance imposes on this group is constitutionally acceptable.

Because it does not set aside prime contracts for minority businesses, the ordinance also preserves the competitiveness of the bidding process for city construction contracts. It contemplates that minority businesses will be involved in this process as subcontractors. A minority contractor has every interest in making its price competitive, since that will enhance the prospect that its prime contractor will receive the contract. The ordinance therefore does not give minority firms any monopoly power.[74] Indeed, by opening up the pool of competitors, the ordinance is likely in the long run to increase the

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[73] 448 U.S. at 484 (plurality opinion). In the five years preceding the enactment of the Minority Business Utilization Plan, the City spent $124 million, or approximately $25 million per year, on construction contracts. According to the United States Bureau of the Census, between $220 and $280 million was spent each year on new construction projects in Richmond between 1978 and 1983. United States Bureau of the Census, May Report: "Value of New Construction Put in Place" (1986). These figures indicate that city construction projects account for approximately ten percent of all construction in Richmond. This means that the thirty percent minority subcontracting requirement accounts for only three percent of all construction contracting opportunities in Richmond.

[74] As the district court found, even if a minority business did have some monopoly power and tried to extract an unreasonably high price, the City could exclude that business from participation on the ground that it is not a "responsible" business. J.S. Supp. App. 186. The City has every financial incentive to ensure that minority businesses do not abuse the plan to obtain unfair profits.

competition for city contracts, and thus reduce costs to the city.[75]

B. The Ordinance Is Designed To Be Reasonable, Flexible And Temporary

The Minority Business Utilization Plan does not establish unreasonable, rigid quotas for the participation of minority-owned businesses in city construction contracts. Its waiver provision permits the plan to be applied in a flexible manner and limits its impact on non-minority contractors. In addition, the Richmond ordinance is temporary and benefits only bona fide minority-owned businesses.

The ordinance provides for five agencies to assist contractors in locating qualified minority businesses to participate in a construction contract. J.S. Supp. App. 67. If a prime contractor demonstrates that compliance with the subcontracting requirement is not feasible because sufficient qualified minority businesses are not available, the City waives or lowers the thirty percent requirement as appropriate. *Id.* at 65-70. The thirty percent requirement therefore is not a rigid numerical quota, but a goal that is waived or lowered in instances where it unduly burdens non-minority prime contractors and serves no remedial purpose.[76]

Particularly in light of the waiver provision, the choice of the thirty percent figure was reasonable. Tying the subcontracting requirement to the percentage of minority contractors in Richmond was not a viable option. Because the percentage of minority contractors was itself

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[75] For precisely this reason, the district court concluded that the Richmond ordinance was consistent with competitive principles. *Id.* at 142-46.

[76] The City also has a procedure whereby a disappointed bidder may protest an award or a decision to award a contract. As the district court found, this procedure may be used to protest the denial of a requested waiver once the contract has been awarded. *See* J.S. Supp. App. 192.

low as a result of discrimination, that approach only would have perpetuated that discrimination. Instead, the thirty percent figure is approximately midway between one percent—the percentage of city contracts awarded to minorities—and fifty percent—the percentage of minorities in Richmond. The ten percent set-aside upheld in *Fullilove* rested on similar logic. Justice Powell explained that the set-aside was reasonable because the figure "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-14 (Powell, J., concurring). Arriving at the thirty percent figure " 'necessarily involve[d] a degree of approximation and imprecision,' " [77] but the choice was a reasonable one.[78]

The fact that the Richmond ordinance is temporary further enhances its reasonableness. The expiration date is consistent with the remedial nature of the ordinance. Because the ordinance was designed to last only five years, and virtually no minority firms had been receiving city construction contracts, it was highly unlikely that the ordinance would outlive its remedial purpose. J.A. 14. The ordinance is designed merely to *attain* a better racial balance in the awarding of city construction contracts, rather than to *maintain* a particular balance. *See Johnson*, 107 S. Ct. at 1456.

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[77] *Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters*, 431 U.S. at 372).

[78] A similar choice for a similar purpose was made by the Office of Federal Contracts Compliance of the U.S. Department of Labor ("OFCCP"). OFCCP in 1980 set employment goals for the construction industry for standard metropolitan statistical areas ("SMSA") through the United States. 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65984-91 (1980). It adopted a goal of 24.9% minority employment for the Richmond SMSA which, according to the 1970 census figures used by OFCCP, had a minority population of 25.5%. 45 Fed. Reg. at 65981, 65985. *See* U.S. Bureau of the Census, PC(1)-B48, General Population Characteristics Virginia, 1970 Census of Population (1970).

Finally, the Richmond ordinance has administrative provisions which, as the district court found, require the city contracting officer to deny minority business status to firms unless they are majority owned and actually controlled by minorities. J.S. Supp. App. 62, 215-19. The purpose of these provisions is to ensure that businesses participating in the plan are not "sham" minority businesses in fact controlled by whites. *Id.* at 218. The City takes this provision seriously, as illustrated by *Mega Contractors v. City of Richmond*, Civ. No. 84-0022-R (E.D. Va. Dec. 3, 1984), the companion case to this one below. In that case, the district court found that the City acted reasonably in denying minority business status to a contracting firm that was nominally owned by a minority group member but actually controlled and operated by whites. *See* J.S. Supp. App. 215-22.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the court of appeals and uphold the constitutionality of Richmond's Minority Business Utilization Plan.

Respectfully submitted,

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